IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 444 of 1998
In
COMPANY PETITION No. 126 of 1990
with
COMPANY APPLICATION NO.445 OF 1998
IN
COMPANY PETITION NO.212 OF 1994
WITH
COMPANY APPLICATION NO.301 OF 2005
IN
COMPANY PETITION NO.126 OF 1990

For Approval and Signature:
HONOURABLE MR.JUSTICE A.S.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAZDA PROPERTIES LTD. - Applicant(s)
Versus
O.L. OF VITTA MAZDA LTD. & 9 - Respondent(s)

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Appearance : COMPANY APPLICATION NO.444 OF 1998 & 445 OF 1998

MR PERCY KAVINA LD. COUNSEL FOR MR. VARIAVA for Applicant(S)1,
MR RM DESAI for Respondent(s) : 1,
MR MRUGESH JANI for Respondent(s) : 2,
NOTICE SERVED for Respondent(s) : 3, 5,9 - 10.
NOTICE UNSERVED for Respondent(s) : 4,6 - 8.
MR RD DAVE for Respondent(s) : 5,
MR PP BANAJI for Respondent(s) : 10,

COMPANY APPLICATION No. 301 of 2005

MR RM DESAI for Applicant(s) : 1,
ME PP BANAJI for Respondent(s) : 1,
MR PERCY KAVINA LD. COUNSEL FOR MR RE VARIAVA for Respondent(s):2,

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CORAM : HONOURABLE MR.JUSTICE A.S.DAVE

Date : 30/08/2006

COMMON ORAL JUDGMENT

1. These Company Applications Nos.444/98 and 445 of 1998 have been filed by the applicants with a prayer to grant leave to the applicants under Section 446 of the Companies Act, 1956, (“the Act” for short) for impleading the Official Liquidator appointed by this Court as a Liquidator of M/s. Vitta Mazda Ltd., (in liquidation) in place instead of the said Company in R.A.D. Suit (Stamp) No.2021 of 1998 in the Court of Small Causes, at Mumbai and to prosecute the said company, inter-alia, praying for restraining the liquidator of M/s. Vitta Mazda Ltd. from dispossessing the applicants from the premises being 203, Elphinstone House, 17, Marzban Road, Opp : Sterling Theatre, Mumbai 400001.

2. That both the above applications have similar

prayers, but filed in different Company Petitions, namely, Company Petition No.126 of 1990 and Company Petition No.212 of 1994 in view of the common order dated 27-8-98, passed by the learned Company Judge in both the above Company Petitions, by which the Official Liquidator was appointed as the Liquidator of M/s Vitta Mazda Ltd, company in liquidation.

3. It is stated by the applicants that original landlords of the premises in question, namely, the trustees of Elphinstons Cricket Club had permitted sub-letting of the above premises and were entitled to sub-let the same to the applicants and thus the applicants were put into use, occupation and possession of the premises in or about December, 1986 and thus, they are paying monthly compensation of Rs.9,500/- per month. It is also stated that the applicants have deposited with said M/s. Vitta Mazda Ltd. (in liquidation) sum of Rs.4,50,000/- by way

of security deposit on or about February, 1996. It is stated that Civil Suit being R.A.D. Suit (Stamp)No.2021 of 1998 came to be filed in the Court of Small Causes at Mumbai against the said M/s Vitta Mazda Ltd. and also against the trustees of Elphinstone Cricket Club, Mumbai, being the landlords of the said premises. Upon a prayer made, Notice of Injunction bearing No.3747/98 was made returnable on January 11, 1999 and the certified copy of the further order dated 2-9-98 is produced on the record of the case.

4. Thus, it is stated that the applicants are entitled to implead the Official Liquidator of M/s. Vitta Mazda Ltd. (in liquidation) in place of the said company in the above suit pending in the Small Causes Court at Mumbai.

5. It is to be noted that so far as M/s. Vitta Mazda Ltd., company in liquidation, is concerned, suit bearing L.E.C. & E. Suit No.20/22 of 1995 was filed by the trustees of Elphinstone Cricket Club, Mumbai and order

dated 25-6-97 came to be passed by which M/s. Vitta Mazda Ltd. (in liquidation) was directed to deposit without prejudice an amount of Rs.6,23,642/- which was in arrears towards the amount of maintenance charges up to 31-5-97 and also directed to deposit arrears of compensation and service charges as per the terms of the agreement amounting to Rs.1,98,900/- and to continue to deposit further amount of compensation for occupation charges at the rate of Rs.11,700/- per month. Since the company was ordered to be wound up by the learned Company Judge of this Court, by the order dated 27-8-98, passed in Company Application No.226 of 2003 and in Company Petition No.126 of 1990 Company Application No.226 of 2003 was filed by the trustees of Elphinstone Cricket Club,Mumbai seeking permission under Section 446 of the Act to proceed with the above suit being L.E.C & E. Suit No.20/22 of 1995, pending before the Small causes Court at Mumbai and

also to implead the Liquidator of the company namely M/s. Vitta Mazda Ltd. (in liquidation) as defendant so that the Liquidator can defend the aforesaid suit. However, in view of the objection raised by the Official Liquidator that there is some dispute in connection with the recovery of deposited amount of Rs.12 lacs, it was kept open for the Official Liquidator to take out appropriate proceeding, in accordance with law.

Learned Company Judge by an order dated 30-7-2004, passed in above Company Application No.226 of 2003, granted permission to proceed with the suit as above with a rider that if decree is passed in the aforesaid suit, the same shall not be executed without prior permission of this Court.

6. Thus, the genesis of dispute which arises from the agreement dated 1-11-86, executed between the trustees of Elphinstone Cricket

Club, Mumbai and M/s. Vitta Mazda Ltd. (now in liquidation), has culminated in the above proceeding in view of rival claims made by the trustees of the Elphinstone Cricket Club, Mumbai, the claim of sub-tenancy by Mazda Properties Ltd., applicants of Company Application No.444 of 1998 and 445 of 1998 and the Official Liquidator of M/s. Vitta Mazda Ltd., in liquidation. So far as Company Application No.301 of 2005 is concerned, the same is filed by the Official Liquidator in view of the observations of the learned Company Judge in the order dated 30-4-2004, passed in Company Application No.226 of 2003 by which it was kept open to the Official Liquidator to take out appropriate proceeding in accordance with law.

7. From the pleadings in the proceedings, affidavit in reply and rejoinder filed by the concerned parties, a clear fact is born out that the dispute about sub-tenancy raised by the applicants of Company Application

Nos.444/98 and 445/98 is in existence. The claim of sub-tenancy of the applicants of the above applications is disputed by the trustees of the Elphinstone Cricket Club i.e. original landlords and also by the Official Liquidator of M/s. Vitta Mazda Ltd. (in liquidation). The claim of the applicants based on usage and occupation initially of 500 square feet of the club premises and thereafter with effect from April, 1996, of use of approximately 1,000 square feet is again disputed. Reliance placed on the agreement and supplementary agreement of 1986 is the subject matter of the dispute in the pending Civil Suits before the Small Causes Court, Bombay, is not denied. The order dated 10-9-98, passed in Injunction Notice by the learned Judge in R.A.D. Suit No.2021/98, reveals about certain documentary evidence produced before the Small Causes Court, Mumbai in support of the pleadings about the sub-tenancy of the applicants. It

is therefore, established at this stage that the proceedings are pending before the Small Causes Court at Mumbai. So far as reply filed by the respondent No.2 in Company Application No.444/98, various contentions of the applicants about sub-tenancy and use, occupation and possession of the premises in question from 1986 and paying monthly compensation of Rs.9,500/- were denied. Even depositing Rs.4,50,000/- with the Club is also denied.

8. In a reply filed to the Company Application No.301 of 2005, preferred by the Official Liquidator of the Company in liquidation, the Executive Secretary of Elphinstone Cricket Club has deposed that by virtue of order dated 25-6-97, passed by the Court of Small Causes at Mumbai, the company was directed to continue to deposit sum of Rs.11,700/- per month and also lump sum of Rs.6,23,642/- towards arrears of maintenance and Rs.1,98,900/- towards the arrears of

compensation. Thus, the amount deposited by Mazda Properties Ltd., applicants of Company Application Nos.444/98 and 445/98, in the Registry of the Court, was required to be handed over to Elphinstone Cricket Club, Mumbai, being outstanding dues. At the same time, the claim of the Official Liquidator for refund of deposit amount of Rs.12 lacs was disputed and it was submitted that the Official Liquidator be directed to hand over peaceful and vacant possession of the suit premises of the club. It is further submitted that since the club is allowed to proceed with the pending suit bearing L.E.C. & E Suit No.20/22 of 1995, by this Court by order passed in Company Application No.226 of 2003, the prayer of the Official Liquidator in Company Application No.301 of 2005 need not require to be entertained, since the Official Liquidator is already joined as party-defendant in the above suit proceeding.

9. Shri Parcy Kavina, learned advocate appearing

with Mr. Variava has submitted that admist rival contentions raised by concerned parties in the above proceedings and particularly in view of the permission granted to Elphinstone Cricket Club by this Court vide order dated 30-7-2004, passed in Company Application No.226 of 2003 to proceed with L.E.C. & E Suit No.20/22 of 1995, the applicants of Company Application No.444/98 and 445/98, claiming sub-tenancy and usage and occupancy since December, 1986, are equally entitled to seek permission under Section 446 of the Act. That the subject matter of similar nature is pending for adjudication by the competent Court in view of leave granted by this Court to Elphinstone Cricket Club, Mumbai in Company Application No.226 of 2003. That the claim of the present applicants is also pending in a separate suit proceedings originatated from agreement and supplementary agreement of 1986 being R.A.D. Suit (Stamp) No.2021 of 1998 and the documentary evidence

produced therein, the dispute can effectively decided by leading evidence, permission/leave under Section 446 of the Act is required to be granted.

10. Shri Kavina, learned advocate for the applicants has further relied on the affidavit in reply dated 25-2-2006, filed by the Chartered Accountant and Director of respondent No.2 company, namely, Mazda Properties Ltd. that respondent No.2 has already deposited Rs.6,43,534/- besides the sum of Rs.13,06,466/- already paid to the company in liquidation on or before 26-2-98. He has referred to paragraph Nos. 6 and 10 of the above affidavit and submitted that the amount is paid for the period 1-8-98 to 31-3-2004 and also for the period 1-4-2004 to 31-7-2004 and the outstanding dues for a further period up to February, 2006 on the basis of Rs.9,500/- per month towards compensation, which comes to Rs.1,71,000/- is also paid.

11. Thus, it is submitted that a case is made

out to grant permission as prayed for.

12. Shri Desai, learned advocate appearing for the Official Liquidator has submitted that prayer made in Company Application No.301 of 2005 may kindly be granted, since the learned Company Judge has kept it open for the Official Liquidator to proceed in accordance with law by virtue of order dated 30-7-2004, passed in Company Application No.226 of 2003 and the company in liquidation is entitled for a sum of Rs.12 lacs for the amount of security deposit, deposited by the company with the Elphinstone Cricket Club, Mumbai.

Shri Banaji, learned advocate appearing for Elphinstone Cricket Club, Bombay, has relied on affidavit in reply dated 15-2-2005, filed in Company Application No.444 of 1998, another affidavit dated 15-12-2005, filed in Company Application No.301 of 2005 and further affidavit dated 26-4-2006, filed in the same application and contended that in fact, Elphinstone Cricket Club is liable to

recover the dues from the company in liquidation as ordered on 25-7-97, by the learned Small Causes Court at Bombay in the pending suit being L.E.C. & E. Suit No.20/22 of 1995.

13. Having heard the learned counsel appearing for the parties, it is an undisputed fact that the suit filed by the present applicants namely Mazda Properties Ltd. being R.A.D. Suit (Stamp) No.2021 of 1998 is pending in the Court of Small Causesa at Mumbai. It is equally true that a plain reading of the above suit more particularly cause title clearly mention name of the company in liquidation i.e. M/s. Vitta Mazda Ltd. and the trustees of Elphinstone Cricket Club, Mumbai. Even the order dated 2-9-98 is passed on an application of injunction by the learned Judge of Small Causes at Mumbai. Thus, the proceedings of the suit for which leave of this Court is sought for under Section 446 of the Act have

its origin in the agreement of 1986 and subsequent transactions which have taken place between the parties. That this Court has granted leave to Elphinstone Cricket Club, Mumbai for the suit pending in the Court of Small Causes at Mumbai being L.E.C. & E. Suit No.20/22 of 1995 where the plaintiff is Elphinstone Cricket Club, Mumbai and the company in liquidation, namely, M/s. Vitta Mazda Ltd. is the defendant. That the dispute between the parties for rights accrued out of the agreement is yet to be adjudicated and prima facie adequate material is produced by the applicants which can be appreciated by leading evidence, and therefore, it is just and proper to grant leave to the present applicants also to proceed with the pending suit, subject to a rider that if any decree is passed, the same shall not be executed without prior permission of this Court.

It is also relevant that in the affidavit

in reply, filed by the Director of respondent No.2-company, in Company Application No.301 of 2005 in Company Petition No.126 of 1990 is concerned, it is stated in a tabular form that payment is already made to M/s Vitta Mazda Ltd. The said fact is reflected in para 5 of the said affidavit dated 25-2-2006. The above amount is paid on or before 26-2-1998 and subsequently the amount due, as directed by this Court on 5-7-2004, which is Rs.6,43,534/-, is also paid towards compensation for a period from August, 1998 to March, 2004. Thereafter, also the due towards compensation at the rate of Rs.9,500/- per month is paid which comes to Rs.1,71,000/- up to February, 2006.

14. In that view of the matter, the amount deposited in this Court by the applicants of Company Application No.444 of 1998 and 445 of 1998, namely, M/s Vitta Mazda Ltd., required to be transferred to the concerned Small Causes Court where the suit proceedings are

pending and it will be open for the said Court to decide the subject matter on merits and pass appropriate orders accordingly.

15. So far as Company Application No.301 of 2005 is concerned, by an order dated 30-7-2004, leave is granted by this Court to the trustees of Elphinstone Cricket Club,Mumbai on a condition to implead the liquidator of the company in liquidation as a defendant, and therefore, interest of the company in liquidation can very well be taken care of by the liquidator in the above suit proceeding. By the same reasoning, liquidator of the company in liquidation i.e. M/s. Vitta Mazda Ltd. is also to be shown as a defendant by the present applicants of Company Application No.444 of 1998 and 445 of 1998 and the applicants shall deposit cost of Rs.15,000/- (Rupees Fifteen Thousand Only) to the liquidator for defending the aforesaid suit. Thus, the question which was left open by the learned Company Judge in the order dated 30-

7-2004, passed in Company Application No.226 of 2003, by which it was kept open for the Official Liquidator to take out appropriate proceeding, in accordance with law, does not mean that the liquidator to file another company application which he has filed being Company Application No.301 of 2005, particularly, when he was allowed to be impleaded as a party-defendant in the suit filed by the Elphinstone Cricket Club, Mumbai, pending before the Court of Small Causes, at Mumbai.

16. Thus, a case is made out by the applicants to grant leave for proceeding with the suit being R.A.D. Suit (Stamp) No.2021 of 1998, pending before the Court of Small Causes at Mumbai on a condition that the applicants of Company Application No.444 of 1998 and 445 of 1998 shall deposit Rs.15,000/- (Rupees Fifteen Thousand Only) towards the cost of the liquidator to defend the case after impleading him as a party-defendant in the

above suit proceedings. It is however, ordered that outcome of the suit proceedings for which leave is granted shall be subject to final approval by this Court in the pending proceedings. If any decree is passed, the same shall not be executed by the plaintiff without prior permission of this Court.

The amount deposited by the applicants before this Court pursuant to the order dated 5-7-2004, shall have to be transferred by the Registry to the Court of Small Causes at Mumbai where the suit proceedings are pending.

17. Subject to the above conditions, Company Application Nos.444 of 1998 and 445 of 1998 are allowed. Company Application No.301 of 2005, filed by the Official Liquidator of M/s. Vitta Mazda Ltd. stands rejected. No order as to costs.

(**ANANT. S. DAVE, J.**)

*mithabhai